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IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA DEPARTMENT OF REVENUE, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

GENERAL DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit correctly held that the meaning of the terms "assessed" and "assessable", as used in the Federal Bankruptcy Code, 11 U.S.C. § 507(a)(8)(A)(iii), is to be determined by state law.

2. Whether the Eleventh Circuit correctly held that agreements between private parties and state taxing authorities determine the meaning of the terms "assessed" or "assessable . . . by agreement", as used in the Federal Bankruptcy Code, 11 U.S.C. § 507(a)(8)(A)(iii).

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all of the parties.

Petitioner Continental Casualty Company is wholly owned by CNA Financial Corporation, which in turn is owned 84 percent by Loews Corporation. Petitioner Continental Casualty Company's nonwholly owned subsidiaries are the following:

Agency Management Services, Inc.

Cinema Completions International, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION OF THE COURT	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS THAT THE MEANING OF TERMS IN THE FEDERAL BANKRUPTCY LAWS IS DETERMINED BY FEDERAL LAW	8
II. THE DECISION BELOW CREATES A CONFLICT BETWEEN CIRCUITS	11
III. THE ISSUE PRESENTED HERE IS OF GREAT IMPORTANCE TO FEDERAL, STATE AND LOCAL TAXING AUTHORITIES	13
IV. THE ELEVENTH CIRCUIT'S HOLDING THAT PRIVATE PARTIES MAY DETERMINE WHETHER A TAX IS "ASSESSED" OR "ASSESSABLE" BY AGREEMENT IS ERRONEOUS AND SHOULD BE REVERSED	15
CONCLUSION	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
Board of Trade of Chicago v. Johnson, 264 U.S. 1 (1924)	9
City of New York v. Feiring, 313 U.S. 283 (1941)	8, 9
Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. Dist. Ct. App. 1976)	4
Florida Dep't of Revenue v. General Dev. Corp. (In re General Dev. Corp.), 1996 U.S. App. LEXIS 7530 (11th Cir. 1996)	2
Florida Dep't of Revenue v. General Dev. Corp. (In re General Dev. Corp.), 165 B.R. 691 (S.D. Fla. 1994)	2, 3, 6
Groetken v. Illinois Dep't of Revenue, 843 F.2d 1007 (7th Cir. 1988)	10
H&H Beverage Distribs. v. Department of Revenue of Pennsylvania, 850 F.2d 165 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988)	10
In re General Dev. Corp., 138 B.R. 128 (Bankr. S.D. Fla. 1992)	2, 5
In re Seibert, 914 F.2d 102 (7th Cir. 1990)	10
King v. Franchise Tax Bd. of California (In re King), 961 F.2d 1423 (9th Cir. 1992)	6, 7, 11, 12
Kinney System, Inc. v. Continental Ins. Co., 21 Fla. L. Weekly S43 (Fla. Jan. 25, 1996)	14

Page(s)

National Rifle Assoc. v. Linotype Co., 591 So. 2d 1021 (Fla. Dist. Ct. App. 1991) 14

New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund, 886 F.2d 714 (4th Cir. 1989) 9

Ohio Bureau of Workers' Compensation v. Yoder, 36 F.3d 484 (6th Cir. 1994) 10

Page v. Edmunds, 187 U.S. 596 (1903) 9

Standard Oil Co. v. Kurtz, 330 F.2d 178 (8th Cir. 1964) 10

Tarver v. Trois Etoiles, Inc., 78 B.R. 237 (9th Cir. 1987) 10

Taylor v. Department of Professional Regulation, Bd. of Medical Examiners, 493 So. 2d 498 (Fla. Dist. Ct. App. 1986) 14

Thompson v. State, 638 So. 2d 116 (Fla. Dist. Ct. App. 1994) 14

U.S. Constitution

U.S. Const. art. I, § 8, cl. 4 13

Statutes and Legislative Materials

Federal Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978) 8

11 U.S.C. § 507(a)(8) 13

11 U.S.C. § 507(a)(8)(A)(i) 5

11 U.S.C. § 507(a)(8)(A)(ii) 5

	Page(s)
11 U.S.C. § 507(a)(8)(A)(iii)	*passim*
28 U.S.C. § 157	5
28 U.S.C. § 1254(1)	2
Pub. L. 98-353, § 350(2), 98 Stat. 333, 358 (1984)	2
Pub. L. 103-394, § 304(c)(2), (3), 1994 U.S.C.C.A.N. (108 Stat.) 4106, 4132	2
S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787	13
124 Cong. Rec. H32415 (daily ed. Sept. 28, 1978)	13
Fla. Stat. ch. 120.57	4

Miscellaneous

Florida Department of Revenue Form 890	3

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PETITION FOR A WRIT OF CERTIORARI

The State of Florida Department of Revenue and Continental Casualty Company respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit reversing the decision of the District Court is unreported and is reprinted in the Appendix to this petition

at A1-A15.[1] The Order of the United States District Court for the Southern District of Florida reversing the decision of the Bankruptcy Court is reported at 165 B.R. 691 (S.D. Fla. 1994) and is reprinted at A16-A31. The Memorandum Opinion and Order of the United States Bankruptcy Court for the Southern District of Florida sustaining the debtor's objection to the claim filed by the Florida Department of Revenue is reported at 138 B.R. 128 (Bankr. S.D. Fla. 1992) and is reprinted at A32-A41. The Order of the Bankruptcy Court denying motions for rehearing and striking certain language from the Opinion is unreported and is reprinted at A42-A44.[2]

STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Eleventh Circuit was entered on March 27, 1996. No petition for rehearing or suggestion for rehearing en banc was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the interpretation of 11 U.S.C. § 507(a)(8)(A)(iii),[3] set forth below:

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[1] The decision of the Eleventh Circuit, without the text of the opinion, is unofficially reported at 1996 U.S. App. LEXIS 7530 (11th Cir. 1996).

[2] The published version of the Bankruptcy Court's Opinion contains the language that was subsequently stricken.

[3] Prior to a 1994 amendment, this subsection was the seventh priority and was numbered 11 U.S.C. § 507(a)(7)(A)(iii). *See* Pub. L. 103-394, § 304(c)(2), (3), 1994 U.S.C.C.A.N. (108 Stat.) 4106, 4132. Prior to a 1984 amendment, this subsection was the sixth priority and was numbered 11 U.S.C. § 507(a)(6)(A)(iii). *See* Pub. L. 98-353, § 350(2), 98 Stat. 333, 358 (1984). Neither amendment made any change to the substance of the subsection, changing only the order of priority. Throughout this petition, the current statutory designation will be used for consistency.

"(a) The following expenses and claims have priority in the following order:

* * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

* * *

(iii) other than a tax of a kind specified in Section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]"

STATEMENT OF THE CASE[4]

On February 2, 1979, the Florida Department of Revenue ("DOR") issued a notice of deficiency to General Development Corporation ("GDC") proposing a tax deficiency for the years 1974 through 1976. GDC filed a timely protest with DOR, and DOR issued a revised notice of deficiency on January 13, 1981, which reduced the proposed tax deficiency.

On March 6, 1981, GDC protested the revised notice of deficiency to DOR. After an informal meeting between the parties, DOR sustained the amount proposed in the revised notice and issued a Notice of Decision in the form of a letter delivered on or about April 18, 1981. At that point in time, GDC had the option, under Florida law, of challenging the proposed deficiency through an action in circuit court or through an administrative appeal process. *See* DOR Form 890

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[4] Except for the discussion of the courts' opinions, this statement of the facts follows that in the opinion of the District Court. *See Florida Dep't of Revenue v. General Dev. Corp. (In re General Dev. Corp.)*, 165 B.R. 691, 693-94 (S.D. Fla. 1994); A17-A19.

(stating that DOR's final notice of decision may be appealed administratively pursuant to Fla. Stat. ch. 120.57 or judicially to the circuit court pursuant to *Department of Revenue v. University Square, Inc.*, 336 So. 2d 371 (Fla. Dist. Ct. App. 1976)); A18.

GDC timely appealed the proposed deficiency set forth in the Notice of Decision on June 18, 1981, by filing a complaint against DOR in the Circuit Court for the Second Judicial Circuit in Leon County, Florida (the "State Court Action"), challenging the legality of the proposed deficiency. As required under Florida procedural law, in order to proceed with the State Court Action, GDC posted a bond on which Continental Casualty Company ("CCC") is the surety. Under Florida law, DOR could not attempt to collect the proposed deficiency during the pendency of the State Court Action.

Roughly nine years later, on April 6, 1990, GDC filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. At the time the bankruptcy case was commenced, the State Court Action was still pending, with the parties having engaged in various forms of discovery and other pre-trial practice. DOR filed a priority unsecured claim in the bankruptcy case. GDC and DOR subsequently settled the State Court Action for $1,958,530.00, which was approved by the Bankruptcy Court by Order dated September 14, 1990. On September 28, 1990, the state court entered a consent final judgment against GDC in the amount of $1,958,530.00.

After the entry of the consent judgment, DOR submitted a revised priority unsecured claim in the bankruptcy case. GDC objected, arguing that the claim was a general unsecured claim not entitled to priority under § 507(a)(8)(A)(iii) of the Bankruptcy Code, which grants priority to claims for taxes

not "assessed" before the bankruptcy, but "assessable" after the bankruptcy filing.[5]

The Bankruptcy Court, which had jurisdiction over this dispute pursuant to 28 U.S.C. § 157, sustained GDC's objection and concluded that the tax was "assessed", as that word is defined in the Florida statutory scheme, when DOR issued the Notice of Decision in 1981. *In re GDC*, 138 B.R. 128 (Bankr. S.D. Fla. 1992); A32-A41. DOR argued before the Bankruptcy Court that the meaning of the term "assessed" in the Federal Bankruptcy Code should be determined as a matter of Federal law, that the term "assessed" meant taxes that were final and collectible and that the court should look to state law only to determine when DOR's tax claim achieved the qualities of finality and collectibility requisite for a tax to be deemed "assessed". *See In re GDC*, 138 B.R. at 129-30; A35-A36. The Bankruptcy Court rejected these arguments and decided that the meaning of the word "assessed", as used in the Federal Bankruptcy Code, was to be determined by the way in which Florida state law defines the term "assessed". *In re GDC*, 138 B.R. at 129-30; A35-A36. Motions for rehearing were denied. In its order denying motions for rehearing, the Bankruptcy Court made

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[5] The other subsections of § 507(a)(8)(A) grant priority (i) to taxes for a taxable year ending on or before the date of the bankruptcy filing, if a required return was due no more that three years prior to the bankruptcy filing and (ii) to taxes assessed within 240 days before the bankruptcy filing. *See* 11 U.S.C. § 507(a)(8)(A)(i) and (ii). These subsections thus grant priority to taxes which are final and collectible *before* the bankruptcy filing as long as the taxing authority has been diligent in its collection efforts. Here, § 507(a)(8)(A)(iii) is the only applicable subsection because DOR was prevented by operation of law from collecting the tax until *after* GDC's filing in bankruptcy.

it clear that "finality" was not required for a tax to be deemed "assessed" under Florida law:

> "With respect to the language in the Court's February 25, 1992 order to which the parties object, the following language is deleted as it is not material to the Court's decision on the substantive issues. At page 2, paragraph 3, the language 'and constitutes the final administrative action taken by [DOR] with respect to the taxes' is hereby deleted." A42-A43.

The District Court reversed the decision of the Bankruptcy Court, finding that the meaning of the term "assessed" is to be determined under Federal law and that "finality" is the key criterion in determining the date of assessment. *Florida Dep't of Revenue v. General Dev. Corp.* (*In re GDC*), 165 B.R. 691 (S.D. Fla. 1994); A16-A31. In this respect, the District Court followed *King v. Franchise Tax Bd. of California* (*In re King*), 961 F.2d 1423, 1427 (9th Cir. 1992), where the meaning of the term "assessed" was decided as a matter of Federal law and the court held that "'it is common sense that a tax assessment, as a formal act with significant consequences, cannot occur before it is final.'" *In re GDC*, 165 B.R. at 696-97 (quoting *King*, 961 F.2d at 1427); A25-A26. Applying Federal law and the concept of "finality" as its framework, the District Court found that the tax was not "assessed", under applicable Florida law, until the consent final judgment was entered in the State Court Action. *In re GDC*, 165 B.R. at 697; A28.

GDC appealed to the Eleventh Circuit, which reversed the judgment of the District Court. A1-A15. The Eleventh Circuit expressly noted that "DOR and CCC argue that due to the necessity of developing uniformity throughout the Code, the applicable state law should be reviewed to determine when a tax deficiency acquires the quality of finality that is inherent in the Code's usage of the term 'assessment.' " A6. The Eleventh Circuit, however, rejected this argument and found

instead that the meaning of the term "assessed" as used in the Federal Bankruptcy Code was determined by the definition of that term in Florida law. A6. The Eleventh Circuit then examined Florida law and concluded that the tax was "assessed", as that term is defined in the Florida statutory scheme, in 1981 by DOR's Notice of Decision and that finality was not necessary. A7-A15.

REASONS FOR GRANTING THE WRIT

This case presents the important question of whether terms used in the Federal Bankruptcy Code are to be interpreted by adopting the definition of those terms in the law of the state asserting the claim. The Court should grant this petition not only to answer the question of Federal statutory construction presented, but also to resolve the conflicts created by the Eleventh Circuit's decision. The decision of the Eleventh Circuit conflicts with the decisions of other courts, including this Court, holding that the definitions of terms in state law do not determine their meaning in the Federal Bankruptcy Code. On the precise question of statutory interpretation presented, the decision of the Eleventh Circuit conflicts with the decision of the Ninth Circuit in *King v. Franchise Tax Bd. of California* (*In re King*), 961 F.2d 1423 (9th Cir. 1992). Resolution of the issue presented by this petition is of great importance because the Eleventh Circuit's decision severely undermines the uniformity of the Bankruptcy Code's application to the taxing laws of the several states and encourages private parties and state taxing authorities to redefine the concepts of "assessed" and "assessable" to their advantage in particular cases.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS THAT THE MEANING OF TERMS IN THE FEDERAL BANKRUPTCY LAWS IS DETERMINED BY FEDERAL LAW

Both this Court and other courts have addressed questions concerning the meaning of terms found in various provisions of the Federal Bankruptcy Code and its predecessor, the Federal Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978). Those decisions uniformly hold that the terms in the Bankruptcy Code are to be determined as a matter of Federal law and that state or local law is referred to only to determine the legal characteristics of an obligation. Following the logic of these cases, the term "assessed" should be given a uniform Federal definition—such as "final and collectible"—and Florida law should be referred to only to determine when the tax acquires those legal characteristics.

In *City of New York v. Feiring*, 313 U.S. 283 (1941), this Court addressed the question of whether a "sales tax" imposed by the City of New York was a "tax" entitled to priority under § 64 of the Bankruptcy Act. The Court could not have been more clear in holding that the label applied by the City of New York was not controlling:

> "Whether the present obligation is a 'tax' entitled to priority within the meaning of the statute is a federal question. . . . Intended to be nationwide in its application, nothing in the language of § 64 or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law of the state's demand. Hence we look to the terms and purposes of the Bankruptcy Act as establishing the criteria upon the basis of which the priority is to be allowed.
>
> . . . The particular demand for which the City now claims priority of payment as a tax is created and

> defined by state enactment. We turn to its provisions and to the decisions of the state courts in interpreting them, not to learn whether they have denominated the obligation a 'tax' but to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64."

Feiring, 313 U.S. at 285. *See also Board of Trade of Chicago v. Johnson*, 264 U.S. 1, 8-11 (1924) (finding a seat on the Chicago Board of Trade to be "property" under the federal bankruptcy laws despite the holding of the Supreme Court of Illinois that such a seat was not "property"); *Page v. Edmunds*, 187 U.S. 596, 601-05 (1903) (same, regarding seat on Philadelphia Stock Exchange and decisions of the Supreme Court of Pennsylvania).

Although *Feiring* was decided under the predecessor to the current Bankruptcy Code, the Fourth Circuit has followed *Feiring* in determining whether premiums due a workers' compensation fund were "excise taxes" entitled to priority under 11 U.S.C. § 507(a)(7)(E). *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714 (4th Cir. 1989). The Court found that:

> "Whether workers' compensation premiums are taxes entitled to priority as excise taxes pursuant to 11 U.S.C. § 507(a)(7)(E) is to be determined as a matter of federal law so that the priority provision in the Bankruptcy Code can be 'nationwide in its application,' . . . and must be answered by reference to the 'terms and purposes' of the bankruptcy statute. Designation by a state of payments as 'premiums' in its statute is not determinative; the 'label' does not control."

New Neighborhoods, 886 F.2d at 718 (quoting *Feiring*, 313 U.S. at 285) (citations omitted).

Similarly, the Third Circuit, in determining whether a Pennsylvania "notice of audit assessment" constituted a "notice of deficiency" under § 362(b)(9) of the Bankruptcy Code, held that:

> "Although § 362(b)(9) uses the term 'notice of tax deficiency,' the provision applies to any governmental unit. . . . [T]he Code contemplated that all governmental taxing entities should receive equal treatment under § 362. Therefore, because the Commonwealth does not label its notice a 'tax deficiency' notice, we must examine the effect of a federal, *i.e.*, an IRS, 'notice of tax deficiency,' and then compare Pennsylvania's equivalent notice provision."

H&H Beverage Distribs. v. Department of Revenue of Pennsylvania, 850 F.2d 165, 168 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988).

These cases, and others too numerous to discuss in detail,[6] all follow the same approach—namely, that in order to ensure that the Federal bankruptcy laws are applied uniformly, the labels given to rights or obligations by state and local jurisdictions cannot control the treatment of those rights and obligations in a Federal bankruptcy proceeding.

The decision of the Eleventh Circuit in this case departs from that approach and expressly holds that the state law label *is* controlling. Although this Court has adopted the approach of looking beyond the labels applied by state or local jurisdictions in construing the now-superseded Bankruptcy

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[6] *See, e.g., Ohio Bureau of Workers' Compensation v. Yoder*, 36 F.3d 484, 487 (6th Cir. 1994); *In re Seibert*, 914 F.2d 102, 106 (7th Cir. 1990) (as amended); *Groetken v. Illinois Dep't of Revenue*, 843 F.2d 1007, 1013 (7th Cir. 1988); *Tarver v. Trois Etoiles, Inc.*, 78 B.R. 237, 238 (9th Cir. 1987); *Standard Oil Co. v. Kurtz*, 330 F.2d 178, 180-81 (8th Cir. 1964).

Act, this Court has not decided whether the same approach applies to the construction of the Bankruptcy Code. The Court should grant this petition in order to affirm the principle that the meaning of the terms in the Federal Bankruptcy Code are to be determined uniformly as a matter of Federal law regardless of the terms' definitions in the varying laws of state and local jurisdictions.

In reaching its contrary decision, the Eleventh Circuit relied on the fact that the words "assessed" and "assessable" are accompanied by a reference to the words "under applicable law" in 11 U.S.C. § 507(a)(8)(A)(iii). A6. However, that phrase was plainly necessitated by the fact that this section of the Federal Bankruptcy Code determines the priority to be afforded all income taxes, whether state, local or Federal. Although the term "assessed" should have a uniform Federal definition, it is necessary to refer to "applicable law" to determine that the proceedings by the tax jurisdiction have progressed to the point when the tax acquires legal characteristics satisfying the Federal definition of "assessed". This is exactly what the District Court did in this case. The phrase "under applicable law" can therefore be given its full intended meaning without a construction that delegates to the many state and local taxing authorities the power to determine the meaning of the term "assessed" in the Federal Bankruptcy Code.

II. THE DECISION BELOW CREATES A CONFLICT BETWEEN CIRCUITS

The Eleventh Circuit's decision creates a direct conflict with the decision of the Ninth Circuit in *King v. Franchise Tax Bd. of California* (*In re King*), 961 F.2d 1423 (9th Cir. 1992). In *King*, the Ninth Circuit held that the term "assessed" as used in § 507(a)(8)(A)(iii) had a uniform, Federal definition referring to a certain set of legal characteristics, regardless of the terminology applied to that set of legal characteristics under state law. *Id.* at 1425-27. The Eleventh

Circuit attempted to distinguish *King*, *see* A11, on the grounds that "California does not specifically designate a particular event as the act of assessment." *King*, 961 F.2d at 1426. To the Ninth Circuit, however, the absence of a state definition of the term "assessed" was beside the point: "We do not blindly apply state-created labels; instead we look to the substantive legal attributes that state law affords." *Id.* The Eleventh Circuit further misconstrued the *King* decision as holding that the definition of the term "assessed" in the Internal Revenue Code was controlling. A11 & n.5. The Ninth Circuit held that the term "assessed" should be construed as a matter of Federal law to insure the uniformity of application of the Federal Bankruptcy Code intended by Congress. However, the Ninth Circuit did not regard the Internal Revenue Code's definition of "assessed" as controlling. The Ninth Circuit merely relied on the Internal Revenue Code as one of the analogous Federal statutory references appropriate for determining the meaning of the term "assessed" in the Federal Bankruptcy Code. *See King*, 961 F.2d at 1425-27. The Ninth Circuit found that the Internal Revenue Code, as well as other provisions of the Federal Bankruptcy Code, used the term "assessed" to refer to a tax that has acquired the legal characteristics of finality and collectibility. *See id.* at 1427.

In the present case, the Eleventh Circuit expressly rejected the notion that the term "assessed" had a uniform, Federal definition or that it required the qualities of finality or collectibility. A6, A9. Unless the Court grants this petition in order to resolve this conflict, the application of 11 U.S.C. § 507(a)(8)(A)(iii) will vary depending upon the Circuit in which the bankruptcy is administered, and will vary further in certain Circuits, depending upon which state or local taxing authority is making the claim. The Court should grant this petition in order to ensure that the Federal Bankruptcy Code is applied uniformly by all Federal courts.

III. THE ISSUE PRESENTED HERE IS OF GREAT IMPORTANCE TO FEDERAL, STATE AND LOCAL TAXING AUTHORITIES

Although this case arises from a dispute over whether a particular claim for a tax owed to DOR is entitled to priority in the administration of the bankruptcy of GDC, far more than the priority of a single tax claim is at issue. What is at issue is whether the Federal Bankruptcy Code is intended to discriminate between identical claims arising under the laws of different states based on the terminology of the laws and regulations used to describe those claims in the jurisdiction in which they arose, rather than on the legal attributes of those claims.

The Eleventh Circuit's decision not only departs from controlling canons of Federal statutory interpretation, but also frustrates two of the primary congressionally articulated purposes of the Federal Bankruptcy Code.

First, the Eleventh Circuit's decision necessarily disrupts the uniform application of the Federal Bankruptcy Code not only by reason of its conflict with the Ninth Circuit's decision in the *King* case, but also because of its rejection of a uniform Federal definition of the terms "assessed" and "assessable". *See, e.g.*, U.S. Const. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

Second, 11 U.S.C. § 507(a)(8) was enacted to codify Congress's view that "the tax collector . . . should not lose taxes . . . which the law has restrained him from collecting." S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5800. The specific subsection in question in this case, 11 U.S.C. § 507(a)(8)(A)(iii), was enacted to cover situations "where the assessment or collection of a tax was prohibited before the [bankruptcy] petition pending exhaustion of judicial or administrative remedies." 124 Cong. Rec. H32415 (daily ed. Sept. 28, 1978)

(statement of the Hon. Don Edwards, upon introducing the House Amendment to the Senate Amendment to H.R. 8200). The Eleventh Circuit's decision in this case denied priority treatment to DOR's claim even though it is undisputed that DOR was prohibited by Florida law from collecting the tax pending the outcome of the State Court Action. Thus, although DOR's claim is exactly the type of claim to which Congress intended to grant priority treatment, such treatment was denied because of a label applied to the tax at issue by the State of Florida.

The decision below is also of great importance to the State of Florida because it threatens to impair the collection of state taxes. By adopting a definition of "assessed" that permits a finding of assessment at a time before the tax is final and capable of immediate collection, the decision creates a perverse incentive for certain taxpayers confronting the prospect of bankruptcy to indulge in groundless attempts to frustrate the collection of a tax in the hope that taxes thereby postponed until bankruptcy may be relegated to the status of general unsecured obligations. Moreover, since litigation in circuit court in Florida is one alternative to administrative review of initial tax determinations in Florida, the Eleventh Circuit will create incentives for certain taxpayers to institute litigation rather than using the administrative process, thereby placing additional pressures on Florida's already overburdened judicial system.[7] Finally, since the Eleventh Circuit's decision

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[7] *See, e.g., Kinney System, Inc. v. Continental Ins. Co.*, 21 Fla. L. Weekly S43, S44 (Fla. Jan. 25, 1996) (noting an "ever-increasing crush" of litigation that consumes judicial resources); *Thompson v. State*, 638 So. 2d 116, 118 (Fla. Dist. Ct. App. 1994) (Goshorn, J., dissenting) (noting that Florida courts are overburdened); *National Rifle Assoc. v. Linotype Co.*, 591 So. 2d 1021, 1022 (Fla. Dist. Ct. App. 1991) (same); *Taylor v. Department of Professional Regulation, Bd. of Medical Examiners*, 493 So. 2d 498, 501 (Fla. Dist. Ct. App. 1986) (Zehmer, J., dissenting) (same).

incorporates a Florida definition of "assessed" into the Federal Bankruptcy Code, it imposes disadvantages unique to the State of Florida. Because it is commonplace for bankruptcies of interstate corporations to include the tax claims of various different states, the State of Florida is immediately exposed to the risk of being unfairly disadvantaged by the Eleventh Circuit's holding that Florida taxes are assessed well before they are final or collectible.

IV. THE ELEVENTH CIRCUIT'S HOLDING THAT PRIVATE PARTIES MAY DETERMINE WHETHER A TAX IS "ASSESSED" OR "ASSESSABLE" BY AGREEMENT IS ERRONEOUS AND SHOULD BE REVERSED

DOR's attempt to collect the tax owed by GDC arose out of a consent judgment in which GDC and DOR agreed to the amount of tax owed by GDC. In that agreement, GDC and DOR reserved their positions with respect to the priority to be accorded GDC's tax obligation in the bankruptcy proceeding. The District Court held that the agreement between GDC and DOR constituted an assessment "by agreement" within 11 U.S.C. § 507(a)(8)(A)(iii) because it constituted a final determination of the amount of tax owed and permitted DOR to enforce its claims immediately. The Eleventh Circuit reversed, relying on the fact that by agreement the parties had reserved their positions concerning the priority of the tax claim in the GDC bankruptcy. This fact led the court to conclude that the parties had not entered into an "agreement regarding assessment", A14, even though there remained no qualification to the finality and enforceability of DOR's tax claim.

Petitioners are not aware of any other situation in which a Federal court has held that the meaning of the terms in a Federal statute may be determined by private agreement of the parties. While a court will necessarily examine the rights and obligations created by an agreement to determine whether

these obligations have the characteristics of finality and enforceability necessary to constitute an assessment, deferring to the private parties' definition of assessment would seem both unprecedented and unwise.

The Court should therefore grant this petition in order to make clear that the term "assessment" "by agreement" is to be defined by the Federal courts as a matter of statutory construction and not delegated to definition by private agreement between taxing authorities and taxpayers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

June 25, 1996

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4418

IN RE: GENERAL DEVELOPMENT CORPORATION, Debtor, STATE OF FLORIDA DEPARTMENT OF REVENUE; CONTINENTAL CASUALTY COMPANY, Plaintiffs-Appellees, versus GENERAL DEVELOPMENT CORPORATION, Defendant-Appellant.	D.C. Docket No. 93-1665-CIV-SMA BK: 90-12231-BKC-AJC

Appeal from the United States District Court
for the Southern District of Florida

(March 27, 1996)

Before EDMONDSON and DUBINA, Circuit Judges, and ENGEL */, Circuit Judge.

PER CURIAM:

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*/ Honorable Albert J. Engel, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Appellant-Debtor General Development Corporation ("GDC") appeals the district court's judgment reversing an order of the bankruptcy court. The bankruptcy court found that under applicable Florida law the state corporate tax owed by GDC was considered assessed at the end of the administrative proceedings when the appellee Florida Department of Revenue ("DOR") issued a Final Notice of Decision. The district court reversed the bankruptcy court's order and found that the tax was not considered assessed until it became final at the conclusion of the state court proceedings. We are persuaded that the bankruptcy court's order was correct and, accordingly, reverse the district court's judgment.

I. ISSUES

We address the following issues on appeal:

1. whether the district court erred in reversing the bankruptcy court's determination that DOR's claim was not entitled to priority treatment, because the tax was "assessed" within the meaning of 11 U.S.C. § 507(a)(7)(A)(iii) upon DOR's issuance of its April 1981 Notice of Decision; and

2. whether the district court erred in holding that the tax was "assessable by agreement" after commencement of the bankruptcy case, within the meaning of 11 U.S.C. § 507(a)(7)(A)(iii).

II. STATEMENT OF THE CASE

On February 2, 1979, DOR issued a notice of deficiency to GDC that stated a net tax deficiency of $1,909,110.00 for the years 1974 through 1976. GDC filed a timely protest and DOR issued a revised notice of deficiency on January 13, 1981, that reduced the tax deficiency to $1,219,379.00. GDC protested this revised notice. After an informal conference with GDC, DOR sustained the amount stated in the revised

notice in a letter of Notice of Decision that was delivered on or about April 18, 1981.

DOR attached to the Notice of Decision a copy of DOR Form 890, which provided that a taxpayer may appeal DOR's decision by filing a petition for an administrative hearing pursuant to Fla. Stat. § 120.57, or a suit in the State of Florida circuit court. On June 18, 1981, GDC timely appealed the Notice of Decision by filing a complaint against DOR in the circuit court for the Second Judicial Circuit in Leon County, Florida (the "state court proceeding"). GDC challenged the alleged deficiency as illegal and unconstitutional. In order to proceed in state circuit court, GDC was required to either pay the entire amount of the tax or post bond. GDC posted a surety bond through Continental Casualty Company ("CCC").

On July 31, 1981, DOR issued a "Statement of Tax Due" to GDC, which demanded payment of the tax due. GDC's counsel sent a letter to DOR requesting that it withdraw the statement on the ground that under Florida law the state court proceeding stayed the "proposed deficiency and collection on the same." DOR withdrew the Statement of Tax Due.

While the state court proceeding was still pending, GDC filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on April 6, 1990. DOR filed a priority proof of claim in the bankruptcy proceeding in the amount of $2,677,909.37. CCC also filed an independent claim against GDC. DOR sought relief from the automatic stay to proceed to obtain a judgment in state court. Before the motion was heard, GDC and DOR filed a motion with the bankruptcy court to approve settlement of DOR's tax claim.

The parties settled the state court proceeding for $1,958,530.00, and the bankruptcy court approved the settlement by an order dated September 14, 1990 (the "settlement order"). The settlement order expressly reserved

the rights of the parties on the issue of whether DOR's claim was entitled to priority. In accordance with the bankruptcy court's settlement order, the state court entered a consent final judgment against GDC in the amount of $1,958,530.00 on September 28, 1990.

DOR submitted its tax claim as a priority unsecured claim in the bankruptcy proceeding. GDC objected, arguing that the claim was a general unsecured claim and therefore not entitled to priority under § 507(a)(7)(A)(iii) of the Bankruptcy Code. The bankruptcy court held a hearing on December 11, 1991, sustained GDC's objection, and reclassified DOR's tax claim as an unsecured claim. DOR and CCC's motions for re-hearing were denied. DOR and CCC then filed an appeal to the United States District Court for the Southern District of Florida. The district court reversed the bankruptcy court's order concluding that DOR and CCC's claims were entitled to priority under § 507(a)(7)(A) (iii).[1] GDC then perfected this appeal.

III. STANDARD OF REVIEW

Because the district court functions as an appellate court in reviewing bankruptcy court decisions, this court is the second appellate court to review bankruptcy court cases. This court reviews determinations of law, whether from the bankruptcy court or the district court, *de novo*. *Haas v. I.R.S.*, 31 F.3d 1081, 1083 (11th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2578, 132 L.Ed.2d 828 (1995).

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[1] The district court appeal was once consolidated with another appeal involving the same parties. However, after examination of the file and hearing oral argument, the district court decided to consider the appeals separately. The appeals were separated into two discrete actions—the "*Nunc Pro Tunc Appeal*" and the "Priority Appeal." The district court judgment on appeal here involves only the Priority Appeal.

IV. DISCUSSION

A. *Determination of Assessment*

The Bankruptcy Code (the "Code") affords priority status to allowed unsecured claims of governmental units to the extent that such claims are for:

> (A) a tax on or measured by income or gross receipts—
>
> > (iii) . . . not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

11 U.S.C. § 507(a)(7)(A)(iii).[2] GDC contends that the bankruptcy court correctly found that the tax was assessed upon the issuance of the DOR Notice of Decision in April of 1981, nine years before the bankruptcy filing, and that it therefore was not entitled to priority. In contrast, DOR maintains that the district court was correct in concluding that the tax deficiency was not assessed until the entry of the consent judgment in the Leon County Circuit Court in September of 1990, following the commencement of the bankruptcy case, and therefore was entitled to priority. If the tax liability is not entitled to priority, CCC may be required to pay the liability as surety on the bond posted by GDC at the outset of the state court proceeding.

The Code does not include a definition for the terms "assessed" or "assessable" but qualifies these terms with the phrase "applicable law." The parties to this action disagree over the interpretation of "applicable law" and its relationship to the meaning of "assessment." GDC argues that the term

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[2] Following the October 1994 amendments, § 507(a)(7)(A)(iii) was re-numbered as § 507(a)(8)(A)(iii). There was no change in the wording of the provision except to place such claims in the eighth priority.

"applicable law" means that the definition of "assess" must be found in Florida state law. DOR and CCC argue that due to the necessity of developing uniformity throughout the Code, the applicable state law should be reviewed to determine when a tax deficiency acquires the quality of finality that is inherent in the Code's usage of the term "assessment."

Based on the provision's use of the term "applicable law," it is apparent that state law should govern the determination of when a state corporate tax is considered assessed.

> 'Assess' prominently appears at § 507(a)(7)(A)(ii), and (iii) . . . of the Bankruptcy Code. If the same word is used in different sections of a body of law, the word is generally given the same meaning in each section. As revealed in § 507(a)(7)(A)(iii), the determination of whether a tax is "assessable" is clearly contemplated to involve the applicable tax law. It is an untenable construction to apply tax law only to the question of whether a tax is assessable and not to the companion issue of when a tax is assessed. Congress' decision not to refer to the Internal Revenue Code in 507(a)(7)(A)(ii) or in a relevant definitional section is plausibly explained by the need for that provision to be adaptable to a variety of federal, state and local taxes on or measured by income or gross receipts.

In re Hartman, 110 B.R. 951, 955 (D. Kan. 1990) (internal citations omitted); *see also In re Torrente*, 75 B.R. 193, 195 (Bankr. S.D. Fla. 1987) (finding Internal Revenue Code applicable law for question of when United States federal income tax remained assessable). Analogies to and cases involving federal tax law are not helpful in determining when state corporate taxes are assessed. Consequently, we think CCC and DOR's argument rather strained. Accordingly, we must look to Florida law to determine when GDC's tax liability was considered assessed.

1. *Florida Law*

At all relevant times in this litigation, only one Florida statute provided a definition of the conditions of assessment:

> Whenever a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in s. 214.08 if no protest is filed or, if a protest is filed, on the date when the decision of the department with respect to the protest becomes final, as provided in s. 214.11(4).

Fla. Stat. § 214.03(2) (1979). Florida Statute § 214.08 (1979) provides: "Upon the expiration of 60 days after the date on which it was issued . . . a notice of deficiency shall constitute an assessment of the amount of the tax and penalties specified therein, except for amounts as to which the taxpayer shall have filed a protest with the department under s. 214.11." Although § 214.11(4) was repealed in 1978, it was still referred to in the 1979 version of § 214.03(2). Section 214.11(4) states:

> The decision of the department on any taxpayer's protest shall become final 60 days after issuance of a notice of decision under subsection (2) unless a timely request for reconsideration was made under subsection (3), in which case the decision shall become final upon the issuance of a notice of denial of such request or the issuance of notice of decision on reconsideration.

This case would be easily determined if the Florida legislature had not repealed § 214.11(4), shortly before DOR issued its Notice of Decision in this case, and failed to replace it with something else or change the cross-reference to it in § 214.03(2).

The legislature revised § 214.03(2) in 1991 and re-numbered it as § 220.703, which states in pertinent part:

> Whenever a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in s. 220.713 if no protest is filed or, if a protest is filed, on the date when the decision of the department with respect to the protest becomes final.

Fla. Stat. § 220.703(2) (1991). GDC argues that because the statutes in effect before and after the repeal of § 214.11(4) establish that assessment occurs at the culmination of an administrative process within the agency itself, the tax in question here should be considered assessed on the date of the Notice of Decision. Although this argument is persuasive of legislative intent, it does not take away the fact that the reference to the repealed § 214.11(4) was in the statute in effect at the time of the issuance of the Notice of Decision.[3]

GDC further contends that § 214.11(4) was repealed due to the advent of the Florida Administrative Procedures Act ("APA"). We agree with GDC's contention that the failure to strike the cross reference "as provided in s. 214.11(4)" in § 214.03(2) was merely a drafting omission and did not alter the prior practice that taxes are assessed when the department

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[3] GDC also notes that in 1981 the Florida legislature enacted Fla. Stat. § 72.011 (1981), which was applicable to all actions initiated after October 1, 1981. Section 72.011 states that a final tax assessment is required to maintain any action in an administrative proceeding or in circuit court. The district court dismissed this argument, because the statute was not in effect at the time DOR issued its notice of decision. As is the case with § 220.703(2), this statute seems to evince a legislative intent to maintain the administrative processes of the state's tax system; however, it was not in effect at the time of the issuance of the notice of decision.

makes its final decision on a tax liability. It is unfortunate that the failure to strike five words has caused so much confusion in this case.

The district court and the bankruptcy court arrived at contradictory interpretations of § 214.03(2). The district court concluded that pursuant to this section assessment occurs when a tax is *final* and not simply when the agency makes a decision on the taxpayer's protest. In contrast, the bankruptcy court embraced a different understanding of the *protest* described in § 214.03(2), concluding that the statute referred to the original protest the taxpayer makes within the DOR itself. Consequently, the bankruptcy court found, and we agree, that a tax was considered "assessed" at the conclusion of the protest within the taxing agency itself.

The argument that the tax is not assessed until the amount is finally liquidated and subject to collection is attractive due to its simplicity; however, this is not what the plain meaning of the Florida statutes suggest. The taxes were due and owing on the day of the final Notice of Decision from the DOR, and for this reason Florida statutory law required the taxpayer to either pay the tax or post a surety bond in order to challenge the tax in state circuit court. *See* Fla. Stat. § 214.26 (1979); Fla. Stat. § 26.012(2)(e) (1979).[4] The bankruptcy court

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[4] § 214.26 reads as follows:

Actions involving legality of tax or penalty. In any case involving the legality of any tax or penalty assessed under this chapter, the complainant shall, except where the taxes assessed, including penalties and interest, have been paid to the department prior to the institution of suit, tender into court and file with the complaint the full account of the assessment complained of, including penalties and interest, or file with the complaint a cash bond or a surety bond endorsed by a surety company authorized to do

correctly concluded that the use of the terms "assessed" and "assessment" in § 214.26 and § 26.012(2)(e) constitutes further evidence that an assessment precedes state court review of a tax deficiency. Although the district court regarded the statutes as only jurisdictional in nature and not enlightening on the issue of when a tax is "assessed," we conclude that the statutes reveal that there must first be an assessment for the state court to review. Furthermore, we see no merit in the argument that the state court proceeding "interrupted" the assessment process.

The district court found that because the "Statement of Tax Due" issued by DOR on July 31, 1981, was later withdrawn at GDC's request, there was no valid notice of tax due and demand for payment. However, this request was sent after GDC posted a surety bond to guarantee payment of the tax as was required by statute. Consequently, we are not persuaded that GDC's request for withdrawal of the demand for payment in any way postponed the assessment.

Although CCC and DOR argue that the Florida tax procedure should be analyzed to find the point in time when a tax would be considered "assessed" in terms of the meaning of this word within the federal tax structure, this is not a valid analogy. The federal tax procedure allows a taxpayer to challenge a proposed tax without posting bond or paying the tax. The Florida system is more analogous to an action for a refund after payment of a federal tax. As discussed above, analogy to the federal system when interpreting the

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business in this state or by such sureties as may be approved by the court, conditioned to satisfy any judgment or decree in full, including the taxes complained of, costs, penalties, and interest.

Section 26.012(2)(e) grants jurisdiction to state circuit courts in cases involving the legality of any tax assessment.

"applicable law" of Florida is, as the bankruptcy court in the northern district of Oklahoma noted, "'the fallacy of the transplanted category.'" *In re Lamborn*, 181 B.R. 98, 103 (Bankr. N.D. Okl. 1995) (citation omitted).

The district court, CCC, and DOR rely on *King v. Franchise Tax Board*, 961 F.2d 1423 (9th Cir. 1992), which involved the determination of when a California income tax deficiency is "assessed" for purposes of nondischargeability under § 507(a)(7)(A)(ii). California's case law and statutory law failed to name a particular event as the act of assessment. *Id.* at 1426. As a result, the Ninth Circuit "examine[d] state-created rights so that they can be translated into the bankruptcy process." *Id.* After reviewing various definitions of the word "assess" and acknowledging that California's tax code does not set forth a specific procedure for making entries on the assessment roles [sic] or provide for assessment to trigger an immediate tax lien, the Ninth Circuit concluded that common sense dictates that "a tax assessment, as a formal act with significant consequences, cannot occur before it is final." *Id.* at 1427 (citing *Franchise Tax Bd. v. King (In re King)*, 122 B.R. 383, 387 (Bankr. 9th Cir. 1991)). It is important to note that unlike GDC, the *King* taxpayers did not exercise their rights to appeal the assessment calculation. Moreover, the California statute, unlike the Florida statutes, specifically included the word "proposed" when referring to the assessment. *See King*, 961 F.2d at 1425-26. As a result, *King* is not persuasive in interpreting Florida's tax scheme in which an assessment precedes state court review.[5]

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[5] The district court, DOR, and CCC rely on other case law to support the proposition that a tax must be absolutely final to be assessed. *See In re Hartman*, 110 B.R. 951 (D. Kan. 1990); *In re Wines*, 122 B.R. 804 (Bankr. S.D. Fla. 1991). Problematic with this analysis is that these cases involve interpretation of federal tax law. The Ninth Circuit

2. *Agency Policy*

DOR attached Forms DOR-870 and 890 to the Notice of Decision sent to GDC. GDC refused to sign Form DOR-870, which provided an opportunity for the taxpayer to consent to the assessment by signing the form. Thus, GDC was entitled to the opportunity for appeal as described in Form DOR-890. GDC chose to appeal the assessment in circuit court, which was described in section 2(d) of Form DOR-890 as follows:

> d. *Circuit Court Jurisdiction*
>
> In the case of the *Department of Revenue vs. University Square, Inc.*, . . . it was held that, anything in Chapter 120, F.S., to the contrary notwithstanding, circuit courts retain their jurisdiction to review tax assessments made by the Department through original actions for declaratory judgment.
>
> Accordingly, taxpayers may, within 60 days after adverse Departmental action, choose this forum to have the Department's action reviewed in lieu of filing a petition for review under Chapter 120, F.S. Any suit seeking a tax refund must include the Comptroller of the State of Florida as a party under section 215.26, F.S.

It would appear from this passage that declaratory actions in circuit court serve to review taxes that are already "assessed." However, the district court seemed more persuaded by section 3 of Form DOR-890, which states as follows:

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commented in *King* that federal law was not helpful to its analysis because its structure is so different from California state tax law. *King*, 961 F.2d at 1427 (citation omitted). As discussed *supra*, Florida law should determine when a Florida corporate tax is "assessed." Thus, comparisons to federal law are irrelevant.

3. *Failure to Protest or Petition Under Chapter 120 Florida Statutes or Sue in Circuit Court*

> In the event that you do not avail yourself of any of the opportunities for conferences or review noted above within 60 days of the date of the Department's letter stating its proposed action, that action will become final and no further opportunities for administrative conferences or hearing will be available. If the Departmental action proposes a deficiency and no action is taken by the taxpayer within the 60 day period noted above, a demand for payment of the deficiency, plus penalties and interest, will follow immediately.

Based on this provision the district court inferred that a timely circuit court suit prevents the proposed deficiency from becoming final. The district court's negative inference is not consistent with Florida law or section 2(d) of Form DOR-890, which provides for assessment at the close of the administrative rather than the judicial proceedings. Consequently, agency policy does not suggest that an assessment is not final until the conclusion of the state court proceeding.

B. *Assessment By Agreement*

After finding that the tax was not considered assessed until the conclusion of the state court proceedings and thus was entitled to priority under § 507(a)(7)(A)(iii), the district court additionally held that the tax was assessed by agreement after the commencement of the bankruptcy case for purposes of § 507(a)(7)(A)(iii). The district court determined that the earliest possible "by agreement" date was July 23, 1990, when the Debtor moved the bankruptcy court for approval of a settlement with DOR, and the latest possible "by agreement" date was September 28, 1990, when the state court entered the consent final judgment against the Debtor.

We agree with GDC's argument that the consent final judgment is not an "agreement" within the meaning of § 507(a)(7)(A)(iii), because it is only a settlement of litigation. The agreed motion for entry of the consent judgment specifically provided that the parties were not agreeing to resolve the priority status of DOR's claim in bankruptcy court. Consequently, the consent judgment could not be considered an agreement regarding assessment.[6] The

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[6] The pertinent parts of the summary of the settlement terms stated:

> B. GDC consents and agrees to the lifting of the automatic stay pursuant to Section 362(d)(1) and Bankruptcy Rule 4001(d)(1) for the following limited purposes: (1) Allowing DOR to make demand for payment of the Liability from GDC; (2) Allowing the entry of a Judgment against GDC in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida in the amount of the Liability, $1,958,530 (the "Judgment"); and (3) Allowing DOR to pursue any and all remedies DOR may have against the bond posted [by CCC] in connection with the Action.
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> * * * * *
>
> D. To the extent DOR recovers any or all of the Liability from the Bond Company [CCC], DOR's claim against GDC shall be reduced accordingly. *The parties reserve the right to determine the priority and treatment of any unpaid balance of the Liability in any Plan proposed by the Debtors at some future time during the course of these proceedings, most likely by way of an objection to claim.*

Order Approving Settlement of Department of Revenue's Tax Claim and Granting Partial Relief from Stay, Exhibit "A" (emphasis added).

settlement agreement resolved only the issue of the amount in dispute and allowed DOR to pursue CCC to recover the taxes without violating the automatic stay. We reject DOR's argument that GDC's authorization in the settlement agreement for DOR to make a demand for payment of the liquidated tax and interest agreed upon constituted an assessment by agreement.

V. CONCLUSION

Based on the language of the Florida statutes, we conclude that the corporate income taxes assessed against GDC for the tax years 1974 through 1976 were assessed in April of 1981 by DOR's Notice of Decision. Because the taxes were assessed before the commencement of this Chapter 11 case, they are therefore not entitled to priority under 11 U.S.C. § 507(a)(7)(A)(iii). Accordingly, we reverse the judgment of the district court and remand this case with instructions to affirm the bankruptcy court's order.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

IN RE: GENERAL DEVELOPMENT CORPORATION, et. al., Debtors.	
FLORIDA DEPARTMENT OF REVENUE and CONTINENTAL CASUALTY COMPANY, Appellants, vs. GENERAL DEVELOPMENT CORPORATION, Appellee.	Case No. 93-1665-CIV-ARONOVITZ Case No. 90-12231-BKC-AJC

ORDER REVERSING DECISION OF BANKRUPTCY COURT

This is an appeal by Appellants Florida Department of Revenue ("DOR") and Continental Casualty Company ("CCC") from a Memorandum Opinion and Order Sustaining Objection to Claim Filed By Florida Department of Revenue entered on February 25, 1992 by Judge A. Jay Cristol of the United States Bankruptcy Court for the Southern District of Florida. *See In re General Development Corp.*, 138 B.R. 128

(Bankr. S.D. Fla. 1991). This Appeal has been referred to by the parties and the Court as the "Priority Appeal."[1]

The Court has carefully considered the briefs on appeal, oral argument of counsel, the record on appeal, the decision of the lower court and the applicable law, and is otherwise fully advised in the premises. For the following reasons, this Court REVERSES the decision of the Bankruptcy Court.

Factual and Procedural Background

This matter arises from a tax claim by DOR against Appellee General Development Corporation (the "Debtor") for corporate income taxes for the years 1974, 1975 and 1976. The following relevant facts are undisputed.

On February 2, 1979, DOR issued a notice of deficiency to the Debtor, stating a net tax deficiency of $1,909,110.00 for the years 1974 through 1976. The Debtor timely protested this notice and thereafter on January 13, 1981, DOR issued a revised notice of deficiency, reducing the tax deficiency to $1,219,379.00. The Debtor protested the revised notice, and after a meeting between the parties, DOR sustained the amount stated in the revised notice and issued a Notice of Decision with respect to the deficiency in the form of a letter delivered on or about April 18, 1981.

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[1] This appeal was once consolidated with another appeal involving the same parties and facts under Case No. 92-1162-CIV-ARONOVITZ. After an examination of the file and hearing oral argument thereon, the issues raised by the two appeals and the totality of the circumstances, the Court deemed it appropriate to consider the appeals separately, and the appeals were separated into two discrete actions: (1) the "*Nunc Pro Tunc* Appeal" under Case No. 93-1666-CIV-ARONOVITZ; and (2) the "Priority Appeal" under Case No. 93-1665-CIV-ARONOVITZ. This opinion concerns only the Priority Appeal.

Attached to the Notice of Decision was a copy of DOR Form 890, entitled "Florida Department of Revenue Protest and Appeals Opportunities." Form 890 provided that a taxpayer may appeal DOR's decision by filing a petition for an administrative hearing pursuant to § 120.57, F.S., or a suit in the State of Florida circuit court. Paragraph 3 of Form 890 provided the following:

> In the event that you do not avail yourself of any of the opportunities for conferences or review noted above within 60 days of the date of the Department's letter stating its proposed action, that action will become final and no further opportunities for administrative conferences or hearing will be available. If the Departmental action proposes a deficiency and no action is taken by the taxpayer within the 60 day period noted above, a demand for payment of the deficiency, plus penalties and interest, will follow immediately.

The Debtor timely appealed the Notice of Decision on June 18, 1981 by filing a complaint against DOR in the circuit court for the Second Judicial Circuit in Leon County, Florida (the "state court action"), challenging the alleged deficiency as illegal and unconstitutional. Appellant CCC is the surety on the bond that the Debtor posted in the state court action.

On July 31, 1981, DOR issued to the Debtor a "Statement of Tax Due," demanding payment of the tax due. The Debtor's counsel responded in a letter and requested the withdrawal of the Statement on the ground that the state court action stayed the "proposed deficiency and collection on the same" under Florida law. DOR thereafter withdrew the Statement of Tax Due.

Approximately nine years later on April 6, 1990, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. At that time, the state

court action between DOR and the Debtor was still pending. DOR filed a priority proof of claim in the bankruptcy proceeding in the amount $2,677,909.37. Subsequently, the parties settled the state court action for $1,958,530.00, which was approved by the Bankruptcy Court by Order dated September 14, 1990 (the "Settlement Order"). On September 28, 1990, the state court entered a consent final judgment against the Debtor in the amount of $1,958,530.00 in accordance with the Bankruptcy Court's Settlement Order.

Following DOR's submission of its tax claim as a priority unsecured claim in the bankruptcy proceeding, the Debtor objected. It argued that the claim is a general unsecured claim, not entitled to priority under § 507(a)(7)(A)(iii) of the Bankruptcy Code because the tax was assessed in 1981, nine years before the bankruptcy filing. DOR responded that the tax deficiency never became final by virtue of the state court action and that the tax and interest remained assessable until the state court action was resolved, which was after the bankruptcy filing.

Following a hearing on December 11, 1991, the Bankruptcy Court sustained the Debtor's objection and reclassified DOR's tax claim as a general unsecured claim. *See In re General Development Corp.*, 138 B.R. 128 (Bankr. S.D. Fla. 1991). The lower court concluded that the tax was assessed before bankruptcy upon the issuance of DOR's notice of Decision on April 18, 1981, rather than upon the entry of the state court consent judgment on September 28, 1990. Theretofore, DOR's tax claim was not entitled to priority under 11 U.S.C. § 507(a)(7)(A)(iii). DOR's and CCC's subsequent motions for rehearing were denied. This appeal followed.

Discussion

The Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 158(a) (West 1993).

A. "ASSESSMENT" OF A TAX FOR PURPOSES OF DETERMINING PRIORITY UNDER 11 U.S.C. § 507(a)(7)(A)(iii)

The sole basis for DOR's asserted priority is § 507(a)(7)(A)(iii) of the Bankruptcy Code. That section affords a seventh priority for allowed unsecured claims of governmental units to the extent that such claims are for:

> (A) a tax on or measured by income or gross receipts —
>
> (iii) . . . not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

11 U.S.C. § 507(a)(7)(A)(iii). The Bankruptcy Code does not provide a definition for the term "assessed" or "assessable."

Succinctly stated, the issue on appeal is when does a Florida income tax assessment take place for purposes of determining priority of a tax claim under § 507(a)(7)(A)(iii) of the Bankruptcy Code. This issue is a pure question of law, subject to *de novo* review. *In re Chase & Sanborn Corp.*, 904 F.2d 588, 593 (11th Cir. 1990); *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990). The Debtor contends the tax was assessed upon the issuance of DOR's Notice of Decision in April of 1981 before bankruptcy and therefore, DOR's tax claim is not entitled to priority. The lower court agreed. DOR and CCC argue on appeal that the assessment occurred after the commencement of bankruptcy upon the entry of the consent judgment in September of 1990 and therefore, DOR's tax claim is entitled to priority under § 507(a)(7)(A)(iii). The Court has conducted a *de novo* review and agrees with DOR and CCC for the reasons stated below.

1. "*Assessable . . . Under 'Applicable Law*'"

A tax claim is afforded seventh priority under § 507(a)(7)(A)(iii) if it is assessable "under applicable law" or "by agreement" after the commencement of bankruptcy.

The Court first will consider the "under applicable law" basis for priority.

As a preliminary matter, there is a dispute regarding the "applicable law" that governs the instant issue. Both DOR and the Debtor agree with the lower court's application of Florida state law. CCC, on the other hand, claims that federal law should be applied in the interest of uniformity.

This Court finds that the court below applied the proper law. The lower court correctly construed the phrase "applicable law" to mean "the laws governing assessment and collection of the particular tax for which a priority is asserted." *See In re General Development Corp.*, 138 B.R. at 130. If Congress had intended federal law to determine the question of "assessment" under § 507(a)(7)(A)(iii), regardless of whether the tax at issue is a local, state or federal tax, it could have easily specified "federal law" rather than "applicable law." As suggested by other courts, Congress intended § 507(a)(7)(A)(iii) to be adaptable to a variety of federal, state and local taxes.[2] Since the tax at issue is a Florida state tax, the lower court properly concluded that Florida state law is the applicable law.

Having determined that the ultimate issue is governed by Florida law, the Court now considers whether DOR's tax claim was "assessed" in 1981 under Florida law as determined by the lower court. In reaching that conclusion, the lower

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[2] *See, e.g.*, *In re Hartman*, 110 B.R. 951, 955 (D. Kan. 1990) (determination of "assessable" under § 507(a)(7)(A)(iii) is contemplated to involve applicable tax law so as to be adaptable to a variety of federal, state and local taxes); *In re Oldfield*, 121 B.R. 249, 252 (Bankr. E.D. Ark. 1990) (same). *See also*, *In re Lemke*, 145 B.R. 1005 (Bankr. D. Id. 1992) (applied state law to determine whether state income tax was subject to priority under § 507(a)(7)(A)(iii)).

court relied on Fla. Stat. § 214.26, § 26.012(2)(e), § 214.03(2) and § 72.011. Three of these four sections, however, are not relevant.

Sections 214.26 and 26.012(2)(e) are jurisdictional statutes and clearly do not speak to the issue at hand.[3] Section 72.011 states that "[n]o action may be brought to contest an assessment" of tax "after 60 days from the date the assessment becomes final." *See* Fla. Stat. § 72.011 (1981). The Debtor argues that § 72.011 suggests that an assessment must be final before suit can be brought in state court. That argument is irrelevant to this case as § 72.011 became effective on October 1, 1981 and therefore, was not Florida law at the time the Notice of Decision was delivered to the Debtor on April 18, 1981. Section 72.011 thus is inapplicable.

The remaining statute upon which the lower court relied — § 214.03(2) — is directly on point. Entitled "Assessment," section 214.03(2) provided the following:

> (2) Whenever a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in section 214.08 if no protest is filed or, if a protest is filed, on the date when the decision of the department with respect to the protest becomes final.

Fla. Stat. § 214.03(2) (1979).

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[3] The crux of the Fla. Stat. § 214.26 was a requirement that in any case involving the legality of any tax or penalty assessed, the complainant deposit with the court the full amount of the assessment complained of, or file a cash bond or surety bond. *See* Fla. Stat. § 214.26 (1979). That statute did not deal with the issue of when a tax is "assessed." Neither did Fla. Stat. § 26.012(2)(3) (1979). That section simply granted exclusive original jurisdiction to the state circuit courts in all cases involving the legality of any tax assessment. *See* Fla. Stat. § 26.012(2)(3) (1979).

Section 214.08, in turn, provided in pertinent part that:

> Upon the expiration of 60 days after the date on which it was issued . . . , a notice of deficiency shall constitute an assessment . . . , *except* for amounts as to which the taxpayer shall have filed a protest with the department under § 214.11.[4]

See Fla. Stat. § 214.08 (1979) (emphasis added). The lower court apparently overlooked the "except" clause in § 214.08 in its decision. The effect of that clause is that a notice of deficiency does not constitute an assessment as to those amounts challenged by the taxpayer. In those situations where the taxpayer does file a timely protest, Florida statutory law specifies the date of assessment as "the date when the decision of the department with respect to the protest becomes final." *See* Fla. Stat. § 214.03(2). "Finality" is therefore the key inquiry.

The Debtor argues that DOR's decision became "final" at the end of the administrative process when DOR had calculated and determined the amount of the Debtor's tax liability. It construes "finality" as the conclusion of the administrative process with respect to a particular tax claim. It, however, cites no direct legal authority to substantiate this position. DOR and CCC, on the other hand, maintain that when a taxpayer challenges the tax deficiency by filing a lawsuit, "finality" occurs at the end of the judicial process when the protest has been judicially resolved. Thus, in this case, DOR's decision was not final until the Debtor's objections had been fully adjudicated in the state court action. Based upon a review of the evidence presented and the applicable law, the Court agrees with DOR and CCC and finds that DOR's decision regarding the amount of the

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[4] Although § 214.11 was repealed in 1978, it was still referred to in the 1979 version of § 214.08.

Debtor's tax deficiency, as set forth in the Notice of Decision, was not "final" within the meaning of Fla. Stat. § 214.03(2) until the state court action, as between DOR and the Debtor, has concluded.

Having examined the Notice of Decision, it is clear to this Court that the Notice of Decision was not DOR's final determination of the claimed deficiency but rather, a mere proposal. The Notice of Decision itself states that "should you not agree with our *proposals* and since this letter constitutes our Notice of Decision, the appeals opportunities available . . . are set forth in the enclosed form DOR-890." (emphasis added).

In addition, Form 890 is replete with language indicating that the Notice of Decision was merely DOR's proposed decision regarding the Debtor's tax deficiency. It clearly describes the Notice of Decision as the "Department's letter *stating its proposed action*." (emphasis added). It further directs that a protest should be submitted "within 60 days from the date of the letter which transmits the report or notice that *proposes a deficiency or assessment* . . . " (emphasis added).[5] Most significantly, Form 890 plainly states that failure to timely object to DOR's "proposed action" will result in the DOR's decision becoming "final":

> In the event that you do not avail yourself of any of the opportunities for conferences or review noted above within 60 days of the date *of the Department's letter stating its proposed action, that action will become final* . . . If the Departmental action *proposes* a deficiency and

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[5] Additionally, Form 890 states that the policy of DOR is to afford opportunity for a conference to all taxpayers "who believe they have reason to protest a *proposed deficiency, assessment* . . . or any other Departmental determination adverse to the tax liability . . ." (emphasis added).

> no action is taken by the taxpayer within the 60 day period noted above, a demand for payment of the deficiency, plus penalties and interest, will follow immediately.

(emphasis added). While Form 890 does not expressly state that in the event a timely appeal is taken, DOR's proposed action does not become final, the Court finds no other logical inference.

Furthermore, it appears that in 1981 the Debtor itself was treating the claimed tax deficiency in DOR's Notice of Decision as a mere proposal. The evidence shows that the basis on which the Debtor's attorney requested DOR to withdraw the Statement of Tax Due issued in July of 1981 was its position that the pending state court action stayed, in counsel's own words, the "proposed deficiency."

The aforementioned evidence in the aggregate clearly establish that DOR's Notice of Decision was not a final determination of the Debtor's tax deficiency but rather, was a proposal of the deficiency. The lower court's decision to the contrary is erroneous.

Case law further support [sic] this Court's conclusion. In *King v. Franchise Tax Board of the State of California*, 961 F.2d 1423 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit was faced with the issue of when is a California income tax deficiency "assessed" for purposes of rendering the assessment nondischargeable under § 507(a)(7)(A)(ii). The tax board argued that its Notice of Proposed Additional Tax ("NPAT") did not fix the date of the assessment because at the time the notice was issued, the additional tax was only "proposed." It claimed that the tax is assessed when it becomes final.[6] The bankruptcy court agreed.

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[6] It should be pointed out that the taxpayers in *King* did not avail themselves of the appeal opportunities available

In affirming, the Ninth Circuit adopted the bankruptcy court's analysis of the meaning of the term "assessed." It agreed that an "assessment" is "a formal, discrete act with specific legal consequences," *citing In re Heritage Village Church and Missionary Fellowship*, 87 B.R. 401, 403 (D.S.C.), *affirmed*, 851 F.2d 104 (4th Cir. 1988), as well as "a formal act of fixing of tax liability." *In re King*, 961 F.2d 1426-27. The Ninth Circuit further stated that:

> . . . it is common sense that a tax assessment, as a formal act with significant consequences, cannot occur before it is final. . . . Prior to this final date, the assessment is best described as a tentative calculation which the taxpayer has no obligation to pay.

Id. at 1427. *See also*, *H & H Beverage Distributors v. Department of Revenue of Pennsylvania*, 850 F.2d 165 (3d Cir.), *cert. denied*, 488 U.S. 994, 109 S. Ct. 560 (1988) (Pennsylvania's issuance of "Notice of Audit Assessment" is not tantamount to a lien and therefore did not violate automatic stay).

The *King* decision teaches that for there to be a tax "assessment," there must first be a liability or obligation to pay. The record in this case clearly shows that the Debtor was under no obligation to pay the proposed tax deficiency upon the issuance of the Notice of Decision in April of 1981, nor could DOR compel payment at that time. The Debtor's obligation to pay arose when the consent final judgment was entered by the state court on September 28, 1990.

The soundness of the *King* decision is supported by *In re Wines*, 122 B.R. 804 (Bankr. S.D. Fla. 1991), *affirmed in part, reversed in part on other grounds*, 1992 WL 200602 (S.D. Fla. 1992). The issue in that case was whether a *federal* income tax obligation was dischargeable under

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under the California statutory taxation scheme.

§ 507(a)(7)(A). The Bankruptcy Court in that case ruled that the tax was not "assessed" until the tax court rendered a final decision on the objection to the deficiency:

> Because the debtor and his wife filed the Petition for Reconsideration *the creditor was prohibited from making an assessment on the 1984 deficiency until the tax court rendered a final decision.* In turn, the tax court proceedings were stayed by virtue of the filing of the bankruptcy. Accordingly, the Court finds that *the 1984 tax deficiency had not been assessed by the creditor*, and by operation of section 6213 of the Internal Revenue Code, the deficiency is assessable after the commencement of the case and is, therefore, nondischargeable.

In re Wines, 122 B.R. at 807 (emphasis added).

The Court is mindful of, and agrees with, the Ninth Circuit's statement that "[t]he determination of the precise date of assessment should be accomplished by reference to the specific tax code and practices involved." *In re King*, 961 F.2d at 1427. While the aforementioned cases dealt with statutory taxation schemes other than Florida's, their analysis nonetheless provide [sic] substantial guidance in ascertaining when a proposed tax deficiency is deemed to be "assessed" within the meaning of 11 U.S.C. § 507(a)(7). Moreover, the Debtor has specified no distinguishing aspect or provision in Florida's taxation statutes that would render the *King* and *Wines* analysis inapposite to this case, or that would compel the affirmance by this Court of the lower court's decision.

The case cited by the Debtor, *Florida Export Tobacco Co. v. Department of Revenue*, 510 So. 2d 936 (Fla. 1st DCA 1987), *review denied*, 519 So. 2d 986 (1987), does not advance its position. The Debtor claims that the court in that case concluded that a tax had been assessed when the Department of Revenue determined that a sales tax return was incorrect and communicated by letter to the taxpayer that the

taxpayer was required to remit a tax deficiency. The facts of *Florida Export*, however, are quite different from those in this case.

The Department of Revenue in that case had issued a notice of tax due and demanded payment. The court held that "DOR's notice of tax due and demand for payment of the tax constitutes an assessment that is reviewable in circuit court." *Florida Export*, 510 So. 2d at 942. Thus, an "assessment" occurred when DOR issued a notice of tax due and demand for payment. In this case, there was no valid notice of tax due and demand for payment of tax. The evidence shows that the "Statement of Tax Due" issued by DOR on July 31, 1981 was later withdrawn at the Debtor's request, and therefore, does not constitute a valid demand for payment.

Based upon the foregoing, the Court finds that the Notice of Decision issued to the Debtor did not constitute an "assessment" of tax under Florida law because the Debtor properly filed a timely protest. The Debtor's state court action precluded an "assessment" from being made until the state court rendered a final decision on the Debtor's objections to the Notice of Decision. That final decision was the consent final judgment entered on September 28, 1990. Thus, the Debtor's tax deficiency was not assessed by DOR in 1981 but remained assessable after the bankruptcy case was commenced on April 6, 1990. DOR's tax claim, therefore, is entitled to priority under 11 U.S.C. § 507(a)(7)(A)(iii).

2. "*Assessable . . . By Agreement*"

The Court further concludes that DOR's tax claim is entitled to seventh priority under § 507(a)(7)(A)(iii) on the additional ground that said tax claim was "assessable . . . by agreement, after, the commencement of the [bankruptcy] case." 11 U.S.C. § 507(a)(7)(A)(iii).

The earliest possible "by agreement" date is July 23, 1990, when the Debtor moved the lower court for approval of a

settlement with DOR with regard to DOR's alleged tax deficiency claim. The latest possible "by agreement" date is September 28, 1990, the date on which the state court entered the consent final judgment against the Debtor.[7] In either case, both events occurred after the filing of the bankruptcy petition and therefore, DOR's tax claim was "assessable . . . by agreement, after, the commencement of the case." 11 U.S.C. § 507(a)(7)(A)(iii). Accordingly, DOR's tax claim against the Debtor is entitled to priority under § 507(a)(7)(A)(iii).

Having concluded that DOR's tax claim is entitled to priority under 11 U.S.C. § 507(a)(7)(A)(iii), the Court need not address the Appellants' claims of estoppel and laches against the Debtor.

Conclusion

For the reasons stated above, the Court hereby REVERSES the Bankruptcy Court's Memorandum Opinion and Order Sustaining Objection to Claim Filed By Florida Department of Revenue, entered on February 25, 1992. As explained herein, the Court finds that the Florida Department of Revenue's corporate income tax claim at issue was assessable after the commencement of the bankruptcy case

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[7] At oral argument on the appeal, counsel for the Debtor argued that a consent final judgment is not an "agreement" within the meaning § 507(a)(7)(A)(iii), but rather, is a settlement of litigation. Where, as here, the parties have agreed to the amount of DOR's tax claim and a final judgment thereon entered upon the parties' consent, the Court fails to see the distinction the Debtor is attempting to make. It appears that the Debtor's argument in this regard is based on mere semantics.

within the meaning of 11 U.S.C. § 507(a)(7)(A)(iii) and therefore, is entitled to priority thereunder.[8]

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[8] As previously stated, this appeal presented the sole issue of whether DOR's claim against the Debtor for corporate income taxes in the amount of $1,958,530.00 for the years 1974, 1975 and 1976 is entitled to seventh priority under 11 U.S.C. § 507(a)(7)(A)(iii). By this ruling, the Court has held that DOR's tax claim is entitled to seventh priority. On March 15, 1994, this Court issued a ruling in the related "*Nunc Pro Tunc* Appeal." *See Continental Casualty Co. v. General Development Corporation and Florida Department of Revenue*, ____ F. Supp. ____, ____ B.R. ____ (S.D. Fla. 1994). That appeal involved the failure of the Debtor to notify CCC of its settlement with DOR prior to the Bankruptcy Court's approval of the settlement agreement. The primary issue presented in that appeal was whether any resulting violations of CCC's procedural due process rights were properly cured by a *nunc pro tunc* order entered by the Bankruptcy Court. This Court answered that question in the affirmative.

The net effect of this Court's March 15, 1994 Order in the *Nunc Pro Tunc* Appeal, and this Order in the Priority Appeal, is a finding by this Court that the *nunc pro tunc* relief entered by the lower court was proper and that the Debtor owes DOR the sum of $1,958,530.00 for Florida corporate income taxes for the years 1974, 1975 and 1976 in accordance with the terms of their settlement agreement and a September 28, 1990 Consent Final Judgment entered against the Debtor by the Circuit Court for the Second Judicial Circuit in Leon County, Florida. By the ruling herein in the Priority Appeal, the Court adds only that DOR's claim is entitled to priority payment under 11 U.S.C. § 507(a)(7)(A)(iii). Whether DOR chooses to obtain satisfaction of its tax claim first from the Debtor or CCC remains in DOR's discretion. It, of course, is entitled to

DONE AND ORDERED in Chambers at Miami, Florida, this 22 day of March, 1994.

SIDNEY M. ARONOVITZ
UNITED STATES
DISTRICT JUDGE

copies provided:

The Honorable Norman C. Roettger,
Chief Judge, U.S. District Court
The Honorable A. Jay Cristol,
U.S. Bankruptcy Court
Thomas J. Guilday, Esq.
Mark Freund, Esq.
Kent L. Weissinger, Esq.
Arthur J. England, Jr., Esq.
Mark D. Bloom, Esq.
Paige A. Harper, Esq.
Clerk, Bankruptcy Court

The Honorable James L. King,
U.S. District Court
The Honorable Edward B. Davis,
U.S. District Court

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only one satisfaction of its priority tax claim.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

CASE NO. 90-12231-BKC-AJC

JOINTLY ADMINISTERED

In re GENERAL DEVELOPMENT CORPORATION, et al., Debtors	MEMORANDUM OPINION AND ORDER SUSTAINING OBJECTION TO CLAIM FILED BY FLORIDA DEPARTMENT OF REVENUE (Amended Claim No. 19663)

THIS CAUSE came before the Court for hearing on Wednesday, December 11, 1991 at 2:00 p.m., upon the Debtor's Objection to Claim Filed by the Florida Department of Revenue and Motion for Reclassification of Such Claim (Amended Claim No. 19663). The Court having read and considered the Objection, the Responses filed by the Department of Revenue ("DOR" or the "Department") and Continental Casualty Company ("CCC" or "Continental"), the authorities cited by the parties and other matters of record, heard the argument of counsel and otherwise been duly advised in the premises, issues this Memorandum Decision and Order sustaining the Objection, granting the Motion and reclassifying the DOR Claim as a general unsecured claim.

FINDINGS OF FACT

This contested matter arises out of a claim by the Department for corporate income taxes for the tax years 1974 through 1976, which have been the subject of litigation between the Debtor and DOR since 1981. Specifically, the Debtor objects to Amended Claim No. 19663, filed as a priority claim by the Department on October 9, 1990, and moves to reclassify the Claim as a general unsecured claim.

The facts are essentially undisputed by the parties, such that the Court may dispose of the Objection as a matter of law. A brief history of the events leading up to the filing of the Amended Claim is in order.

On February 2, 1979, the Department issued a notice of deficiency to GDC, proposing a net tax deficiency in the amount of $1,909,110.00. On March 30, 1979, GDC timely protested this notice under Florida law. Thereafter, on January 13, 1981, the Department issued a revised notice of deficiency, reducing the proposed tax deficiency to $1,219,379.00.

On March 6, 1981, GDC protested the revised notice of deficiency, and on March 25 attended an informal conference with the Department to discuss the issues raised in the protest. Following the informal conference, in an undated letter delivered on or about April 18, 1981, the Department sustained the adjustments and deficiencies proposed in the revised notice. The letter was intended to constitute the Department's Notice of Decision with respect to the deficiency, and constitutes the final administrative action taken by the Department with respect to the taxes.

On June 18, 1981, GDC filed a complaint in the Leon County Circuit Court, challenging as illegal and in violation of Florida statutes the Department's determination that the additional taxes were due. After initially filing a corporate bond to cover the tax assessment and interest, GDC obtained

a surety bond on October 14, 1981. The bond has been periodically renewed and increased in amount to cover the accruing interest, and remained in effect as of the date of the Chapter 11 filings. CCC is the surety under the bond, and has filed its own separate claim against the estate.

Upon the commencement of these Chapter 11 cases, the controversy between DOR and the Debtor shifted to this Court. On April 30, 1990, the Department timely filed a proof of claim asserting a priority claim in the total amount of $2,677,909.37, representing $1,219,379.00 in corporate income taxes for the 1974-76 tax years plus $1,458,530.37 in prepetition interest. Thereafter, on June 4, 1990, the Department filed a Motion to Determine Applicability of Stay or for Relief Therefrom, seeking leave to proceed to judgment in the litigation pending in the Leon County Circuit Court.

Following a continuance of the hearing on the DOR stay relief motion, the Debtor filed a Motion to Approve Settlement of Department of Revenue Tax Claim. The resulting Order dated September 14, 1990, ratified and approved the terms of a settlement which liquidated the amount of the Department's claim at $1,958,530.00 and permitted entry of a consent judgment in that amount in the state court action. Thereupon, the Leon County Circuit Court entered the consent judgment on or about September 28, 1990.[1]

The settlement order expressly reserved the rights of the parties with respect to the issue of whether the DOR claim is entitled to treatment as a priority claim under the

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[1] Notwithstanding the entry of that judgment and the Department's subsequent efforts to enforce the bond against CCC as surety, the DOR claim remains unpaid. By separate Order the Court has disposed of the Debtor's Objection to the Claim filed by CCC in respect of that bond.

Bankruptcy Code. It is this issue which the Objection now calls upon the Court to address.

CONCLUSIONS OF LAW

The parties are in agreement that the sole basis for the Department's asserted priority is Section 507(a)(7)(A)(iii) of the Bankruptcy Code, 11 U.S.C. § 507(a)(7)(A)(iii). Pursuant to that provision, allowed unsecured claims of governmental units are afforded a seventh priority, to the extent that such claims are for —

> (A) a tax on or measured by income or gross receipts —
>
> > (iii) . . . not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

Thus, the basic issue before the Court is whether, as the Debtor contends, the tax was assessed upon issuance of the DOR Notice of Decision in April of 1981 or, as the Department contends, only upon entry of the consent judgment in the Leon County Circuit Court in September of 1990. If the Debtor is correct and the tax was assessed in April of 1981, the claim is not entitled to priority; if the assessment did not occur until September of 1990, then the tax was assessable after the commencement of the case and the claim is entitled to priority under Section 507(a)(7)(A)(iii).

The initial issue over which the parties disagree is the question of what law the Court should apply to determine when the tax was assessed. The Department contends that in enacting Section 507(a)(7) Congress used the term "assessed" in the context of the Internal Revenue Code and with direct reference to the federal taxation scheme, such that the Court must look by analogy to federal law. The Debtor argues, and the Court agrees, that this analysis simply misses the mark. By its own terms, Section 507(a)(7)(A)(iii) refers to a tax assessed or assessable "under applicable law," which the Court interprets to mean the laws of the State of Florida

pursuant to which the taxes here in issue were imposed in the first instance.

This interpretation of Section 507(a)(7)(A) finds support not only in the plain language of the statute, but within the case law as well. As noted, Section 507(a)(7)(A)(iii) refers specifically to "applicable law," which the Court construes to mean the laws governing assessment and collection of the particular tax for which a priority is asserted. Notably, Section 507(a)(7)(A)(ii) contains no similar reference, and courts interpreting that subsection have looked to the plain language of subsection (A)(iii) in reaching this same result. The district court's analysis in the case of *In re Hartman*, 110 B.R. 951 (D. Kan. 1990), is directly on point:

> 'Assess' prominently appears at Sections 507(a)(7)(A)(ii), and (iii) . . . of the Bankruptcy Code. Generally, if the same word is used in different sections of a body of law, the word is given the same meaning in each section. . . . In Section 507(a)(7)(A)(iii), the determination of whether a tax is 'assessable' is contemplated to involve applicable tax law. . . . Congress' decision not to refer to the Internal Revenue Code in Section 507(a)(7)(A)(ii) or in a relevant definitional section is plausibly explained by the need for that provision to be adaptable to a variety of federal, state and local taxes on or measured by income or gross receipts.

Id. at 955. *See also In re Oldfield*, 121 B.R. 249, 252 (Bankr. E.D. Ark. 1990) (same analysis of Section 507(a)(7)(A)).

This same construction also finds support within this District. *In re Torrente*, 75 B.R. 193, 195 (Bankr. S.D. Fla. 1987) (applying Internal Revenue Code as "applicable tax law" in case involving claim of priority for federal income taxes pursuant to Section 507(a)(7)(A)(iii)).

Having determined that the ultimate issue before it is governed by the law of Florida, the Court turns next to a

consideration of that law to determine when the subject taxes were assessed. The bond posted by the Debtor with the Leon County Circuit Court reflected on its face that it was so posted pursuant to § 214.26, Fla. Stat. (1979)[2], which provides:

> 214.26 *Actions involving legality of tax or penalty*. In any case involving the legality of any tax or penalty *assessed* under this chapter, the complainant shall, except where the taxes *assessed*, including penalties and interest, have been paid to the department prior to the institution of suit, tender into court and file with the complaint the full account of the *assessment* complained of, including penalties and interest, or file with the complaint a cash bond or a *surety bond* endorsed by a surety company authorized to do business in this state or by such sureties as may be approved by the court, conditioned to satisfy any judgment or decree in full, including the taxes complained of, costs, penalties, and interest.

(emphasis added). The prominent use of the words "assessed" and "assessment" in § 214.26, together with other applicable Florida law, persuades the Court that assessment of the tax occurred prior to the Debtor's circuit court action, when the Department issued its Notice of Decision in April of 1981.

In reaching this result, the Court also relies on other provisions of Florida statutory law, both past and present. Section 26.012(2)(e), Fla. Stat. (1979) granted exclusive

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[2] The Court regards the subsequent repeal of this provision to be immaterial, in that there is no question that it was in effect at the time the Leon County Circuit Court action was commenced. Moreover, upon repeal § 214.26 was replaced with § 72.011, Fla. Stat. (1981), which contains a similar requirement of payment or filing of a bond. Section 72.011(3), Fla. Stat. (1981).

original jurisdiction to the state circuit courts in all cases involving the legality of any tax assessment. DOR has never contested the jurisdiction of the circuit court, but in fact sought and obtained relief from the automatic stay in order to proceed against the Debtor in that court, and subsequently filed a motion in that court to enforce the bond against CCC.

Further support for the conclusion that the taxes were assessed in 1981 exists in Section 214.03(2), Fla. Stat. (1979). That section provides that when a taxpayer protests a notice of deficiency, as GDC did in 1981, the amount of the deficiency "shall be deemed assessed . . . on the date when the decision of the *Department* with respect to the protest becomes final. . . ." *Id.* (emphasis added). That date was sometime in April of 1981, when the Department issued its Notice of Decision in the form of an undated letter. Thereupon GDC commenced its action in the circuit court, and posted a surety bond pursuant to Section 214.26, Fla. Stat.

The Department contends that because GDC had continuously contested the liability for the taxes since the filing of the Leon County Circuit Court action, the assessment of those taxes never became final until that court entered the consent judgment in September of 1990. The basic premise for this argument is that an "assessment" does not occur until the taxes are finally determined to be due and owing and are subject to collection after the taxpayer's exhaustion of all administrative and judicial remedies.

Whatever simplistic appeal this argument may have, it simply cannot withstand a literal reading of the statutory language upon which this Court must rely. Insofar as the Department was concerned, the taxes were due and owing and subject to collection when the Notice of Decision was issued in April of 1981. It is for this reason that in order to contest the legality of those taxes in the circuit court GDC was required to post a surety bond pursuant to § 214.26, Fla. Stat.

(1979). The purpose of this bond is precisely to ensure that taxes assessed by DOR are collectible at such time as their legality is upheld by the courts.

This conclusion is also supported by the Florida Legislature's subsequent enactment of Section 72.011, Fla. Stat. (1981), which provides in pertinent part:

> (1) A taxpayer may contest the legality of any assessment or denial of refund of a tax . . . by filing an action in circuit court;
>
> * * *
>
> (2) No action may be brought to contest an assessment of any tax, interest or penalty assessed . . . after 60 days from the date the assessment becomes final.

Effective as of October 1, 1981, Section 72.011 was intended to clarify existing law. Taken together, Sections 72.011(1) and (2) reinforce the Court's conclusion that the DOR assessment became final in April of 1981, and that GDC timely commenced an action in the Leon County Circuit Court to contest the legality of that assessment within sixty days of its finality.

The Department draws an analogy between the Debtor's circuit court action and a taxpayer's contest if a federal tax in the U.S. Tax Court, and argues that under the federal scheme the tax cannot be assessed until the Tax Court action becomes final and all appeals are exhausted. Where the "applicable law" which governs the issue of assessment under 11 U.S.C. § 507(a)(7)(A)(iii)—in this case, the law of Florida—appears so clear on its face, resort to analogy is inappropriate. In any event, the Court views the Debtor's circuit court action as more analogous to a federal taxpayer's payment of the tax and suit for refund in the District Court, in that the surety bond posted in accordance with Section 214.26, Fla. Stat., represents the "functional equivalent" of payment. *See In re H & H Beverage Distributors*, 850 F.2d

165 (3rd Cir. 1988), *cert. den.* 109 S.Ct. 560 (1988) (Pennsylvania tax law analogous to federal law). The more appropriate Florida analogy to a federal tax court action would be an administrative proceeding under Chapter 120, Fla. Stat., which requires neither payment of the tax nor the posting of a surety bond. GDC, however, elected not to pursue administrative remedies but to commence the action in the Leon County Circuit Court and post the bond.

On the basis of these authorities, the Court concludes that under applicable Florida law the corporate income taxes payable by the Debtor for the tax years 1974 through 1976 were assessed in April of 1981, some nine years before the commencement of this Chapter 11 case. Thus, the taxes were "assessed before . . . the commencement" of this Chapter 11 case, and are not entitled to priority under 11 U.S.C. § 507(a)(7)(A)(iii). For the Department to contend otherwise simply ignores ten years of litigation commenced with the posting of a statutory bond, and the express language of the relevant statutory provisions. Accordingly, it is

ORDERED AND ADJUDGED that the Debtor's Objection to Amended Claim No. 19663 be and hereby is SUSTAINED, and the claim is hereby RECLASSIFIED as a general unsecured claim without priority of any kind.

DONE AND ORDERED in Chambers at Miami, Southern District of Florida, this 25 day of February, 1991.

A. JAY CRISTOL
UNITED STATES
BANKRUPTCY JUDGE

Copies furnished to:

Mark D. Bloom, Esq.
Kent L. Weissinger, Esq.
Mark Freund, Esq.
Michael G. Williamson, Esq.

(Attorney Bloom is hereby directed to serve conformed copies of this Order upon all interested parties shown on the attached service list, immediately upon receipt.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

In re GENERAL DEVELOPMENT CORPORATION, et. al., Debtors.	Case No. 90-12231-BKC-AJC CHAPTER 11 CASE

ORDER DENYING MOTIONS FOR REHEARING

THIS CAUSE came before the Court upon the Florida Department of Revenue's ("DOR") Motion for Rehearing of Order Sustaining Objection to Claim Filed by Florida Department of Revenue and the Motion by Continental Casualty Company's ("CCC") for Rehearing of February 25, 1992, Order Sustaining GDC's Objection to Priority of DOR's Claim and Reclassification of Claim as General Unsecured Claim. The Court reviewed the record and considered all arguments presented in the motions for rehearing and, with regard to the issues presented, the Court's position remains unchanged. For the following reasons, CCC and DOR's motions for rehearing are denied.

1. The court finds the DOR regulations entitled "Failure to Protest or Petition Under Chapter 120 Florida Statutes or Sue in Circuit Court" not helpful in determining when assessment occurred since it only applies to taxpayers who have failed to protest or petition.

2. With respect to the language in the Court's February 25, 1992 order to which the parties object, the following language is deleted as it is not material to the Court's decision on the substantive issues. At page 2, paragraph 3, the language "and constitutes the final

administrative action taken by the Department with respect to the taxes" is hereby deleted. At page 3, the language in the second sentence, "[t]he bond has been periodically renewed and increased in amount to cover the accruing interest, and remained in effect as of the date of the Chapter 11 filings," shall also be deleted.

The preceding deletions are not intended to imply that the statements within are untrue. Moreover, the Court's "Findings of Fact" were not intended to be binding on the parties to the extent not relied upon in the Court's "Conclusions of Law".

3. The affidavit of Stephen J. Barger, Jr. which has been submitted to the Court for consideration for the first time in both DOR and CCC's motions for rehearing, is without merit. Mr. Barger states the July 31, 1981 "Statement of Tax Due" is an "assessment". This precise question is the legal question presented to the Court for determination; and, the Court is not persuaded that the statement is an "assessment." The statement appears to be a bill which the DOR erroneously issued and subsequently withdrew on August 13, 1981. Moreover, nothing in the August 12, 1981 letter from GDC's attorney, Shepard King, to DOR indicates that GDC previously argued an assessment date different from the date now argued.

Thus, the Court does not find any grounds exist which would warrant estoppel against the assessment date now urged by GDC and approved by the Court. Accordingly, it is

ORDERED that the Florida Department of Revenue's ("DOR") Motion for Rehearing of Order Sustaining Objection to Claim Filed by Florida Department of Revenue and the Motion by Continental Casualty Company's ("CCC") for Rehearing of February 25, 1992, Order Sustaining GDC's Objection to Priority of DOR's Claim and Reclassification of Claim as General Unsecured Claim are DENIED.

DONE AND ORDERED at Miami, Florida this 23rd day of April, 1992.

A. JAY CRISTOL
Judge, United States
Bankruptcy Court

Copies furnished to:

Mark Freund, Esquire
Kent Weissinger, Esquire
Mark Bloom, Esquire.